Filed 6/9/16 P. v. Pullin CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BRENT PULLIN, Defendant and Appellant.	F070106 (Super. Ct. No. VCF272454) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Kane, Acting P.J., Poochigian, J. and Franson, J.

Appellant Brent Pullin appeals his convictions on two counts of willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 664, 187, subd. (a)), with special allegations for intentionally discharging a firearm causing great bodily harm (Pen. Code, § 12022.53, subd. (d)), inflicting great bodily injury under circumstances involving domestic violence (Pen. Code, § 12022.7, subd. (e)), and intentionally discharging a firearm (Pen. Code, § 12022.5, subd. (a)). Appellant argues prosecutorial misconduct during closing arguments impinged upon his constitutional rights. Alternatively, appellant contends his counsel's failure to object to the allegedly improper remarks demonstrates inefficient assistance of counsel. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Facts Detailed at Trial

At trial, the People called Sheila Pullin, the victim, three responding officers, a treating nurse, and the investigating detective. Appellant did not testify, but did call his son to testify regarding appellant's relationship with Ms. Pullin and the family's history with firearms. These witnesses testified to the following relevant facts.

Appellant and the victim married in 1985. Although they never formally divorced, the couple separated in 1998. Living apart, they rekindled a non-romantic friendship and would have dinner or attend family events together. Ms. Pullin also provided free bookkeeping services for appellant's excavation business.

Around 2004, Ms. Pullin met and thereafter began a romantic relationship with a man named Albert Pena. This relationship, which appellant knew of, continued for many years; up and through the events in this case. At one point, less than a year prior to the relevant incident, appellant arrived at Ms. Pullin's home to find Mr. Pena in the shower. Appellant responded by punching Mr. Pena and attempting to remove him from the house, telling Ms. Pullin, "I'm just getting tired of him."

In early 2012, Ms. Pullin was involved in a severe car wreck, suffering a broken arm. Without express permission, appellant moved into Ms. Pullin's house to take care of her. Although asked to leave multiple times over several months, appellant refused to leave Ms. Pullin's house. While appellant and Ms. Pullin never fought, and there was apparently no history of violence between them, Ms. Pullin would not bring Mr. Pena to her house while appellant resided there so that there would be no problems.

In early August 2012, Ms. Pullin needed to pick Mr. Pena up from prison. Appellant refused to let her use the car, so she took a taxi. At some point after midnight, Ms. Pullin and Mr. Pena went to Denny's for a meal. Appellant called Ms. Pullin and asked where she was. Ms. Pullin told appellant she was with Mr. Pena at Denny's and that he would walk her home shortly. When she arrived home, appellant was waiting in her front yard and stated, "I was watching you two." Ms. Pullin went inside and went to bed.

Two or three days later, on August 11, 2012, appellant and Ms. Pullin spent the evening together, having dinner and watching television. Around 10:00 p.m., Ms. Pullin went to her bedroom and began reading. Shortly thereafter appellant appeared in her bedroom doorway, approximately 10 feet from where she was lying and reading. As he rounded the corner into Ms. Pullin's room, appellant said, "You'll never laugh at me again." Appellant then fired two shots at Ms. Pullin from a .38-caliber revolver.

The first shot struck Ms. Pullin in the jaw, shattering her gum. Ms. Pullin quickly moved, but the second shot struck Ms. Pullin in her left breast, passing cleanly through. Appellant then left the room. Ms. Pullin grabbed her cell phone from her nightstand, called 911, closed and locked the bedroom door, and fled to the bathroom, trying to lock that door as well. As a result of her call to 911, police were dispatched to her home at approximately 10:14 p.m.

Approximately three or four minutes after appellant first shot Ms. Pullin, and while she was still on the phone with 911, appellant broke through the bedroom door and

came into the bathroom. As Ms. Pullin pleaded with appellant not to shoot her again, appellant fired a third shot into her stomach. This shot passed through Ms. Pullin's stomach, intestine, and gall bladder. Appellant then exited the bathroom, sat down on the bed, and shot himself under the chin.

Police officers breached the bathroom window sometime before 10:28 p.m. By that time, appellant had already shot himself. It was later determined that appellant had placed a call to his son at around 10:15 p.m., leaving a message saying he was sorry, he just couldn't handle it anymore, and that he loved his family.

Both appellant and Ms. Pullin survived. In the course of multiple interrogations following the shooting, appellant made several statements to the police. At first, appellant admitted having a bad couple of weeks leading to the shooting, admitted he was sad about the shooting, and said it happened because of "[l]ots of things and lots of stuff." Later, appellant confirmed Ms. Pullin had been shot while in bed and confessed he was mad at Ms. Pullin and shot her because of someone she was talking to. When asked whether he had planned the shooting in advance, appellant responded, "maybe."

Closing Arguments

During closing argument, the People made two statements contested on appeal. First, the People provided an analogy to baseball while discussing the concept of premeditation. After recounting the jury instructions provided by the court on this issue, the People stated:

> "Now, let me put it—and I think sometimes it's good to give visual images so let me give you an analogy. Say that you're watching a baseball game and the pitcher, he throws the pitch, and we have the batter. That pitch is coming 80, 90 miles an hour, right. That batter sees that ball coming. It's coming quickly, but the batter is the one that can make the conscious, premeditated decision whether or not to swing that bat. Doesn't matter if it's quickly.

> "You have to think about the batter in that situation. If the batter decides to swing whether or not he hits the ball, that's still a premediated decision to swing the bat. So that's a good analogy for us to look at."

No objection was made to this statement.

Later in the argument, after a lengthy recitation of facts relating to intent, premeditation and related argument, the People concluded with the following:

> "I don't want to belabor these points. This case is very straightforward. You heard the 9-1-1 call, and I'm gonna tell you if you can honestly after hearing that 9-1-1 call believe in your heart and your minds that this is anything other than premeditated attempted murder, I would be frankly shocked and dismayed, ladies and gentlemen, 'cause you heard the evidence, and it speaks for itself."

Again, no objection was made.

Appellant was ultimately convicted by a jury on two counts of attempted murder, committed willfully, deliberately and with premeditation. The jury further found true on both counts special allegations that the defendant discharged a firearm, discharged a firearm causing great bodily injury, and personally inflicted great bodily injury under circumstances involving domestic violence. Appellant was sentenced to a term of seven years to life with the possibility of parole, plus an additional consecutive 25-year-to-life term for the gun enhancement. This appeal timely followed.

DISCUSSION

Appellant contends the People's closing arguments show prejudicial prosecutorial misconduct warranting reversal. With respect to the baseball analogy, appellant argues the People misstated the law in a way that relieved the People of having to prove premeditation beyond a reasonable doubt. With respect to the conclusion, appellant argues impermissible vouching on behalf of the People. To the extent these issues have been forfeited, appellant alleges the failure to object constitutes ineffective assistance of counsel.

Standard of Review and Applicable Law

" 'Under California law, a prosecutor commits reversible misconduct if he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " ' [Citations.] In addition, ' "a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" ' [Citation.] Objection may be excused if it would have been futile or an admonition would not have cured the harm." (*People v. Dykes* (2009) 46 Cal.4th 731, 760 (*Dykes*).)

Where properly preserved, allegations of prosecutorial misconduct are reviewed, on the merits, de novo. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 681.)

The Contested Arguments Were Not Improper

As an initial matter, we note that appellant failed to object to any of the statements now contested on appeal. Appellant's arguments have thus been forfeited. (*People v. Rangel* (2016) 64 Cal.4th 1192, 1219 [200 Cal.Rptr.3d 265, 290-291].) As explained below, appellant's claims are also meritless.

Appellant first contends the People's baseball analogy improperly trivialized the reasonable doubt standard. We disagree. Appellant's case law focuses upon situations where one analogizes the reasonable doubt standard to the degree of certainty a person holds in making everyday decisions. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 36

[certainty required to change lanes or marry not similar to reasonable doubt standard]; *People v. Johnson* (2004) 119 Cal.App.4th 976, 978-983, 985 [court improperly related standard to everyday decision making].) But this is not what occurred in this case. Here, the People analogized the time it takes to form a conscious decision to swing a baseball bat to the premeditation jury instruction, which appellant does not challenge on appeal, informing the jury that "a cold, calculated decision to kill can be reached quickly" based on "the extent of the reflection, not the length of time." This comparison had nothing to do with the reasonable doubt standard on which the jury was instructed separately and to which there is also no challenge.

Nor did the People's analogy misstate the relevant law on premeditation. The People did not argue that every swing of the bat would show deliberation regardless of whether the swing was purely instinctual or reflexive, only that "the batter is the one that can make the conscious, premeditated decision whether or not to swing that bat" even in the quick timeframe of a pitch. This is consistent with the instruction's guidance and the law; it is the extent of reflection that matters for premeditation, not the amount of time in which the decision is made. (*People v. Bolin* (1998) 18 Cal.4th 297, 332.) Accordingly, the People's accurate analogy with respect to understanding premeditation did not improperly reduce the burden of proof necessary to demonstrate that element of the crime. (*People v. Solomon* (2010) 49 Cal.4th 792, 813 ["Contrary to defendant's suggestion, a killing resulting from preexisting reflection, of any duration, is readily distinguishable from a killing based on unconsidered or rash impulse."].)

Appellant next contends the prosecutor's statement that he would be "shocked and dismayed" at any verdict which did not result in a premeditation finding improperly vouched for the People's case. We do not agree. Prosecutors have wide latitude in their closing arguments, provided the argument "amounts to fair comment on the evidence," including reasonable inferences or deductions drawn therefrom. (*People v. Gamache* (2010) 48 Cal.4th 347, 371 (*Gamache*).) And prosecutorial misconduct will not be found

unless there is a "reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*Dykes*, *supra*, 46 Cal.4th at p. 772.)

In this case, the prosecutor engaged in an extended recitation and commentary on the evidence, all of which he properly argued showed an extended premeditation period and historical basis to infer an intent to commit murder. At the conclusion of this recitation and argument, the prosecutor returned to a key piece of evidence, the 911 call on which Ms. Pullin pleaded not to be shot again as appellant fired a third time. The prosecutor's comment, that he would be "frankly shocked and dismayed" if anything other than a premeditated attempted murder verdict was returned, was not vouching for his decision to try the case. Rather, it was a direct commentary on the evidence. As he explained to the jury: "[Y]ou heard the evidence, and it speaks for itself." There is no reasonable likelihood a jury would have understood the comment as anything else. (See *Gamache*, *supra*, 48 Cal.4th at 371-373 [finding commentary on relative ease in convicting one defendant and suggestion that the prosecutor was flabbergasted by argument that special circumstances should not be found true were both proper commentary on the evidence].)

Having concluded appellant's arguments are meritless, we need not reach his ineffective assistance of counsel argument. (*People v. O'Malley* (2016) 62 Cal.4th 944, 1010, fn. 12.)

DISPOSITION

The judgment is affirmed.